No. 14,561

IN THE

United States Court of Appeals

For the Ninth Circuit

YAKUTAT & SOUTHERN RAILWAY, a corporation; LIBBY, MCNEILL & LIBBY, a corporation; and BELLINGHAM CANNING COMPANY, a corporation,

Appellants,

vs.

THE CITY OF YAKUTAT,

Appellee.

BRIEF FOR APPELLANTS.

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Appellants,

vs.

THE CITY OF YAKUTAT,

Appellee.

BRIEF FOR APPELLANTS.

Inasmuch as the Clerk on January 27, 1955, informed Appellants that the Court had granted their petition to use and adopt herein their brief in Case No. 13,455, wherein Yakutat & Southern Railway and Libby, McNeill & Libby, but not the Bellingham Canning Company, were appellants and The City of Yakutat was appellee, and wherein the validity of Appellee's assessment and levy of taxes upon the same realty but for the year 1949 (the trial Court having found for Appellants as to the year 1948), instead of the years 1950 and 1951, were challenged, they hereby

do so as a supplement or appendix on such legal points as are in common, and, to save space, will refer thereto as Bf. 13,455, p. so and so.

STATEMENT OF PLEADINGS AND FACTS.

A. Jurisdictional Statutes.

See: Bf. 13,455, pp. 1-22.

B. Pleadings.

The corporations Yakutat & Southern Railway, Libby, McNeill & Libby, and Bellingham Canning Company were the Objectors, but herein are designated as Appellants.

The second class Alaskan municipality, the City of Yakutat, Alaska, was the applicant in this proceeding, but herein is designated as Appellee. Throughout it has been represented by learned practicing attorneys, Wm. L. Paul, Jr., of Juneau and Seattle, and Fred Paul of Seattle.

Proceedings.

This is a purported statutory tax lien foreclosure proceeding under Sections 16-1-121 through 16-1-131, ACLA 1949 (Bf. 13,455, pp. 6-18), instituted in the District Court for the Territory of Alaska at Juneau by Appellee for an order of sale of property, both realty and personalty, situated in the Appellee municipality, to enforce payment of alleged and delinquent municipal taxes, without segregation of the taxes themselves as to realty and personalty, and pur-

portedly entirely against Appellant Bellingham Canning Company alone (PR 16), hereinafter termed "Bellingham", although Appellant Yakutat & Southern Railway, hereinafter termed "Railway", is now and at all times has been the sole owner of the realty, and the Railway and Appellant Libby, McNeill & Libby, hereinafter termed "Libby", were the several but not joint owners during the tax year 1950 of personalty situated within Appellee, and the Railway and Bellingham were the several but not joint owners during the tax year 1951 of personalty situated within Appellee.

Objections.

Appellants' counsel having learned that Appellee intended to present at an unknown hour on September 9, 1952, a purportedly delinquent tax roll for 1950 and 1951, and no delinquent tax roll or application for judgment and order of sale having been filed, and the statute making no specific provision for filing objections in advance, (Appellants' attorney's letter of September 8, 1952, to Judge Folta, PR 13-14), Appellants filed with the Clerk of the District Court on September 8, 1952, their Objections (PR 3-13), a copy whereof they served upon Appellee's attorney. Epitomized therein they set out (PR 4) a copy of the purported Delinquent Tax Roll which was subsequently filed, and specified Appellee's statutory and ordained delinquencies (PR 5-10), including non-appointment of an assessor and lack of assessment, and non-segregation of realty and personalty property taxes and of the several individual ownerships

of the property (PR 6-7); purported assessment against Bellingham alone although Appellee knew Railway owned all the realty and part of the personalty, and that Libby owned part of the personalty to May 2, 1951, and that Bellingham owned part of the personalty since May 2, 1951 (PR 7-8); that the purported assessment was no more than adoption of 1948 assessment and was not based upon any evidence (PR 9-10); that the purported assessments were made in bad faith and not based upon evidence and are excessive and fraudulent (PR 10-11), and that each Appellant had paid its respective taxes at their true and full respective values (PR 11-12).

Appellee admitted (PR 198-200) Objections 1, 2, 3, 4 and 9 (PR 5-6; 8), except it qualified its admission of Objection 9 by claiming it had posted the notices, one on the property involved (PR 200). The last paragraph of Sec. 16-1-122, ACLA 1949 (Bf. 13,455, p. 9), provides:

> "When the delinquent tax roll is not published in a newspaper but notice thereof is given by posting as above provided, the clerk of the municipality shall within ten days after such posting mail to each person to whom a tract is assessed, at his last known address, a notice describing the tract, the amount due as stated on the delinquent tax roll, and giving the time and place when and where judgment and order of sale will be applied for."

Before the Order of Sale was entered on June 29, 1954 (PR 128-129), Appellants served and filed Objections (PR 120-123) on June 24, 1954, supple-

mented by their further Objections of same date (PR 124-125), which were overruled on June 29, 1954 (PR 219, also 125).

Application.

On October 15, 1952, Appellee filed its Application, wherein it stated that "notice of this application for order of sale was duly posted" (PR 15), together with "Notice of Delinquent Taxes Real Property" wherein is set forth a copy of the purported Delinquent Tax Roll (PR 16), which differs in form from that before this Honorable Court in Case No. 13,455 (PR 10, 13 therein; also PR 10, 13 in Case No. 14,-562) and which its Opinion of July 8, 1953 (206 F2d 612), held invalid, only in that it says: "Lot, Block and Description and to Whom Assessed if Known: Bellingham Can Co. Land $11,000; frame bldgs., $176,625; Personal, $94,000" (PR 16), whereas in Cases 13,455 and 14,562 (PR 10, 13), it says: "Lot, Block and Description and to whom assessed: Libby, McNeill & Libby and Yakutat & Southern Railway U.S. Survey Alaska No. 2881 together with personal property thereon located".

The tax for each year is lumped; the penalty is lumped for the two years; and the interest is lumped for the two years. The notice admittedly (PR 234) did not contain the millage rate as prescribed by Sections 9 and 10. Appellee's Ordinance No. 1. (Appendix, pp. viii, ix infra.) That Ordinance was before this court in Case 13,455 (Bf. p. 72) and is now before this Court in Case 14,562 (PR 85-102).

The application is also accompanied by the City Clerk's certificate (PR 17-18) dated August 9, 1952, which intimates that the notice was published (8th line from bottom PR 17) although the application said it was posted (PR 15), and it was admittedly not published (PR 234).

Further Proceedings.

Under Rule 36, FRCP, Appellants on November 21, 1952, requested Admissions from Appellee (PR 27-46), which Appellee answered (PR 88-90) on December 22, 1952, some three weeks late under Rule 36, ibid.

Under Rule 33, ibid, Appellants on November 21, 1952 (PR 46-64), propounded Interrogatories to Appellee. Appellee having made no objections within 10 days or served within 15 days its Answers, Appellants on December 12, 1952, moved (PR 85) for entry of judgment by default under Rule 37(d), ibid.

Thereafter on December 22, 1952 (PR 90-96), Appellee evasively answered, having in the meantime filed its unverified Motion for Extension of Time (PR 87) to answer Appellants' Requests and Interrogatories, which Motion was served on December 19, 1952, some 19 days after the 10 days time allowed by Rule 36(a), ibid, had expired for Appellee to respond or object to Appellants' Requests (PR 27-46) and some 13 days after the 15 days time allowed by Rule 33, ibid, had expired for Appellee to answer Appellants' Interrogatories (PR 46-64).

Appellants on December 23, 1952 (PR 96-98), moved to strike Appellee's Motion for Extension of

Time (PR 87), because no notice thereof was given as required by Rules 33 and 36(a), ibid; and to strike Appellee's Answers (PR 90-96) to their Requests (PR 27-46) because those Answers were not sworn to or timely filed as required by Rule 36(a), ibid, and were tardily filed without the Court's permission, and also to strike Answers 23, 24, 25 and 26 because unintelligible and Answers 1, 12, 13, 14 and 15 because neither immateriality nor ignorance was a sufficient objection or response to a Request; and to strike Appellee's Answers (PR 90-96) to Appellant's Interrogatories (PR 46-64), because those Answers were not sworn to under oath by an official of Appellee as required by Rule 33, ibid, and were tardily filed (some 13 days too late) on December 22, 1952, without permission of the Court having been granted to do so, in utter disregard of Rule 33, ibid, and after Appellants had served their Motion (PR 85) for entry of Judgment by Default under Rule 37(d), ibid, and while that motion was still pending and without any relief having been granted to Appellee under Rule 60(b), ibid.

On December 29, 1952 (PR 22-23; 99), notwithstanding Appellee's clear violation and disregard of Rules 33 and 36, ibid, the Court denied Appellants' Motion for Default (PR 85) and Motion to Strike (PR 96-98) and allowed Appellee's Motion for Extension of Time (PR 87).

On January 7, 1953, Appellants moved (PR 99-102) to Suppress Appellee's Answers (PR 90-96) to their Interrogatories (PR 46-64), which Motion was granted (PR 102) on March 27, 1953, and Appellee given

two weeks within which to respond, but Appellee did not serve its Amended Answers until May 8, 1953 (PR 103-111), two days prior to the trial on May 10, 1954 (PR 24, 115).

On April 17, 1954, Appellants moved (PR 112-113) for Summary Judgment under Rule 56, ibid, and for Judgment on the Pleadings under Rule 12, ibid, which Motion was denied on April 30, 1954 (PR 23-24; 115).

Trial was had on May 10, 1954 (PR 24, 115-117, 170-249) over Appellants' objection (PR 174), inter alia, that this Honorable Court's Opinion of July 8, 1953 (206 F2d 612), in its Case #13,455 was the rule of, governed, and was res judicata in this proceeding.

The case was submitted on briefs (PR 24, 115, 252).

The trial Court rendered its Memorandum Decision (PR 118) on June 16, 1954 (PR 25, 117), wherein it said that Appellants' objections were either lacking in merit or else did not affect their substantial rights. The trial Court thereby ignored Appellee's nonperformance of statutory and municipal requirements in this special proceeding and disregarded this Honorable Court's Opinion of July 8, 1953 (206 F2d 612) in its Case No. 13,455.

Appellee having served Appellants with proposed findings of fact, conclusions of law, cost bill (PR 119-120), and order of sale (PR 128-129), although not ever filing its proposed findings and conclusions, Appellants served and filed their Objections thereto (PR 120-121, 124-125).

On June 25, 1954 (PR 24-25, 124), the trial Court overruled Appellants' Objections except it allowed their objection to interest on penalties and a fee to the City Clerk of $100 (PR 119).

On June 29, 1954 (PR 128-129), the Order of Sale was entered holding delinquent realty taxes for 1950 of $2,033.20, plus 12% penalty thereon of $243.98, plus 1% interest monthly on the tax from December 15, 1950, of $874.28, and for 1951 of $1631.25, plus 12% penalty thereon of $195.75, plus 1% interest monthly on the tax from December 15, 1951, of $489.41, notwithstanding Sec. 12, Municipal Ordinance (Appendix, pp. ix-x infra), does not impose or fix any specific rate of interest on delinquent taxes.

On June 29, 1954 (PR 125), before signing the Order of Sale in this case and in Case No. 14,562, the Court ordered that the evidence introduced in support of Appellants' objections (PR 125) to the Tax Roll in Case No. 14,562 would be considered in this case (Trial Court No. 6734-A).

Appellants' Motion for New Trial (PR 134-136), filed July 2, 1954, was denied July 28, 1954 (PR 126), notwithstanding the trial Court said: "Now, I know there have been a lot of irregularities" (PR 223).

Appellants served and filed their Notice of Appeal on July 30, 1954 (PR 138), and on the same day filed their Supersedeas on Appeal which the trial Court approved, allowed the appeal and stayed the Order of Sale (PR 129-133).

Appellants docketed their appeal on October 25, 1954 (PR 259), the time having been extended to

October 28, 1954, by trial Court Orders of August 31, 1954 (PR 139), and of October 6, 1954 (PR 141-142), because of absence of the Official Court Reporter and her pressure of work.

Appellants filed their Statement of Points (PR 256-259) and Designation of Contents of Record on Appeal (PR 259-260) on October 25, 1954.

Payment of Taxes.

Taxes for 1950 of $1699.20 at 16 mills on Appellant Railway's realty at its true and full value of $99,000 and personalty $7,200 and taxes for 1950 of $785.60 at 16 mills on Appellant Libby's personalty at its true and full value of $49,100.00 were paid with their attorney's letter (PR 40-42) of February 1, 1951, to Appellee's City Clerk, which sums were tendered in full payment of the 1950 taxes and were retained and not refunded by Appellee (PR 42, also 90). Appellant Libby had just recently received Appellee's tax bill (PR 41).

Taxes for 1951 $2866.35 ($2924.85—2%) at 16 mills on Appellants Railway's and Bellingham's respective properties at their true and full combined value of $182,803.00 were paid with latter's letter (PR 44-45) to Appellee's Board of Trustees of December 7, 1951, which payment was retained and never refunded by Appellee (PR 45, also 90).

Municipal Tax Ordinances.

Appellee's Ordinance No. 1 was admittedly in effect through tax years 1950 and 1951 (PR 40, 90, 117,

196). This Ordinance (Appendix, pp. i-xvii infra) before this Honorable Court in its Case #14,562 (PR 85-102), also in Case #13,455 (PR 85-102). It is entitled "An Ordinance to provide for the assessment, levy and collection of taxes; and for the sale of property, both real and personal, for the payment of taxes, penalties, interest and costs", enacted July 3, 1948.

Evidence.

Appellee admitted that its Board of Trustees acted as its own assessor for both 1950 and 1951 and that the same tax valuation for 1949 was adopted pro forma for 1950 and 1951 (PR 196).

On Appellee's exhibit 2 (PR 190), introduced through witness Henry's testimony, under the two sections, one marked "1950-1951", the other "1951", neither giving the name or address opposite the word "owner", under the column headed "Board", not under the column headed "Assessor's", appear the figures "11,000" on the line opposite "land", "176,-125" on the line opposite "improvements" in the "1950-1951" section and "176,625" on the line opposite "improvements" and "11,000" on the line opposite "land" in the "1951" section, and "94,000" on the line opposite "personal" in each section.

It plainly indicates that the purported assessed tax values, if any, are those of the Board, not of any Assessor, contrary to Sections 2, 3, and 4, Municipal Ordinance (Appendix, pp. i-iv infra).

Appellee's exhibit 2 (PR 190) was admitted (PR 189) over Appellant's Objections (PR 178-185, 187-

188). It is entitled "Tax and Assessment Roll No. 5" (PR 190). Witness Henry described it as the "Assessment book" (PR 186).

It doesn't conform to the purported Delinquent Tax Roll (PR 4), and nowhere mentions the name of Appellant Bellingham or its address as required by Sections 3 and 4, Municipal Ordinance (Appendix, pp. ii-iv infra); in fact, no owner's name or address appears on the top line, opposite "Owner" and "Address", in either section labelled "1950-1951" or "1951", or any name or even initials anywhere in the section labelled "1950-1951". On the margin outside of section labelled "1951" appear "Y&SSR" and "Bellingham".

In the section "1950-1951" (PR 190), under column headed "Board", on line opposite "Improvements" it has the figures "176,125", not "Frame Buildings, $176,625" as shown on the Delinquent Tax Roll.

It does not show nor was any proof made that it was ever verified by the assessor or any city official as required by Sec. 4, Municipal Ordinance (Appendix, pp. ii-iv infra).

No proof was made that an assessor, if one ever was appointed for either 1950 or 1951, annually listed and assessed Appellants' respective properties for either 1950 or 1951 as required by Sec. 3, Municipal Ordinance (Appendix, p. ii infra), and by Sec. 16-1-65 ACLA 1949 (B. 13,455, p. 20), or that any such assessor took an oath of office as required by Sec. 16-1-54, ibid (Bf. 13,455, p. 20), both of which

statutes were made applicable to Appellee by Subp. 6th, Sec. 16-2-5, ibid (Bf. 13,455, p. 3).

Appellee's witness Henry testified she was the City Clerk (PR 177-206. Note: PR pp. 228-249 apparently are an inadvertent reprinting of PR p. 192, commencing with Henry's cross examination, through 5th line from top p. 214).

Over Appellants' objections that this Honorable Court's Opinion of July 8, 1953 (206 F2d 612), was the rule of law controlling this proceeding and was res adjudicata herein (PR 174) and that the performance of statutory and municipal requirements were jurisdictional (PR 176) and that it was in similar form to the Duplicate Delinquent Tax Roll before this Court in its Case #13,455, which this Court in said Opinion held invalid, the trial Court admitted (PR 186) as Appellee's Exhibit 1, the purported Delinquent Tax Roll for 1950 and 1951 (PR 4; 16), which Appellants discussed under Application (pp. 5-6 supra).

With Henry's testimony was also admitted as stated Appellee's Exhibit 2 (PR 190), over Appellants' Objections (PR 178-185; 187-188).

The trial Court itself first said of the Duplicate Delinquent Tax Roll for 1950-1951 (PR 4; 16): "Well, it seems that the roll doesn't conform to what the Court held it should be in so far as segregation is concerned, segregation of tax, penalty and interest" (PR 183). It is headed, except for years, the same as that before this Court in its Case #13,455, also #14,562 (PR 9, 16), viz: "Delinquent tax rolls for

the years 1950 and 1951 Delinquent from September 15th of said years."

Appellee admitted there was no dispute as to the amounts paid or valuations claimed by Appellants (PR 172). Those valuations were set out in Appellants' Objections of September 8, 1952, namely: for 1950: Railway, realty $99,000 and personalty $7,200, and Libby, personalty $49,100 (PR 11); and for 1951: Railway, realty $99,000 and personalty $7,200, and Bellingham, personalty $76,603.00 (PR 11-12).

Appellants' payments were also set out in those Objections, namely: for 1950, Railway, $1,699.20 at 16 mills upon realty $99,000 and personalty $7,200, and Libby $785.60 at 16 mills upon personalty $49,100 (PR 11); and, for 1951, a 2% discount being taken because paid before delinquent, Railway, $1665.22 at 16 mills upon realty $99,000 and personalty $7,200, and Bellingham, $1201.13 at 16 mills upon personalty $76,603.00 (PR 11-12).

Appellee admitted the payments (PR 203), also by its Responses (PR 90) to Appellants' Requests 21 through 26 (PR 40-45) wherein is shown that the payments were remitted conditioned that they were in full payment of the taxes and wherein is shown that the payments remitted were retained and not refunded by Appellee.

The Delinquent Tax Roll (PR 4, 16) runs against *Bellingham, only,* although Appellee admitted that Bellingham bought Libby's interests on May 5, 1951, and paid for all of the property within Appellee $100,000 plus $80,000 for inventory (PR 204-205); also

Appellants Railway and Bellingham, by witnesses, testified to their values in the fall of 1951 before the Board of Equalization and were not asked to testify under oath although willing to do so (PR 207-208).

Appellee admitted the salmon cannery was not operated after the 1948 until the 1951 salmon fishing season, and the immateriality of Libby's intent, which Appellants don't concede but deny, to operate not being carried out (PR 208-209).

Appellee admitted that the assessment for 1950 and 1951 ($281,625 aggregate shown in Delinquent Tax Roll, PR 4, 16, although Appellee's Exhibit 2, PR 190, shows "176,125" for "1950-1951" not "176,625" as for "1951" opposite "Improvements") was carried from 1949 (PR 196). Appellants submit that the 1949 valuation of $281,625 is based upon the 1948 valuation equalized at Appellee's Trustees' meeting on November 3, 1949, and took into account neither the removal of property nor non-operation of the cannery after the 1948 salmon fishing season (Bf. 13,455, pp. 85-86), and until the salmon fishing season of 1951 (PR 208-209), and was only equalized at that figure after Appellants Libby and Railway had agreed to it so to settle the controversy and contended that their combined properties were then of the value of $190,-250 (PR 151, Cases 13,455, 14,562).

The trial Court took the position that Appellee was not required to prove it had performed the jurisdictional requirements (PR 176).

The record is replete with evidence that Appellee complied neither with the statutory nor its own tax

ordinance requirements which has been pointed out (pp. 10-15 supra).

All evidence introduced in this Honorable Court's Cases 13,455 and 14,562 (trial Court No. 6581-A) in support of Appellants' objections therein was considered, the trial Court said, in this case (trial Court No. 6734-A) (PR 125).

QUESTIONS PRESENTED.

Appellants will try to cover their 14 Points (PR 256-259) in five propositions.

First—The trial Court was without jurisdiction because of Appellee's nonperformance of the statutory and municipal ordinance requirements in respect to the delinquent tax roll (PR 4, 16) and in respect to Appellee's Exhibit 2 (PR 190) (Points 3, 4, 5, 6, 7, 8, 10, 11, 12) (PR 257-258), and in the pretended assessment and levy of the claimed taxes.

Second—Appellee's witness Henry's evidence (PR 177-206), testamentary and documentary, Exhibit 2, (PR 190), was incompetent and inadmissible to extrinsically either impeach or show facts not disclosed by the delinquent tax roll (PR 4, 16). (Points 10, 11, 12, PR 258).

Third—This Honorable Court's opinion of July 8, 1953 (206 F2d 612), is the law governing this proceeding and its Mandate of August 19, 1953 (PR 335-337, Case 14,562), is res judicata of this proceeding (Point 1, PR 256).

Fourth—The Order of Sale (PR 128-129) disregards Appellants' uncontradicted, unimpeached, competent evidence as to the true and full values of their respective properties, is based upon witness Henry's incompetent and inadmissible evidence (PR 177-206), testamentary and documentary, Exhibit 2 (PR 190), and ignores Appellee's failure to prove the true and full values of Appellants' respective properties, either realty or personalty for either tax year 1950 or tax year 1951 (Points 2, 5, 7, PR 256-258), and to comply with statutory and municipal requirements.

Fifth—The Order of Sale (PR 128-129) allowed interest on claimed taxes although Appellee's tax Ordinances imposed or fixed no specific rate of interest payable thereon, and allowed Appellee an attorney fee contrary to law and despite Appellee had committed "a lot of irregularities" (PR 223), and applied contrary to Appellants' specific instructions, but as selected by Appellee, Railway's and Libby's payments of $1,699.20 and $785.60 for 1950 taxes (PR 11) and Railway's and Bellingham's payments of $1,665.22 and $1,201.13 for 1951 taxes (PR 12). (Points 9, 13, 14, PR 258-259).

FIRST PROPOSITION.

THE TRIAL COURT WAS WITHOUT JURISDICTION BECAUSE OF APPELLEE'S NONPERFORMANCE OF THE STATUTORY AND MUNICIPAL ORDINANCE REQUIREMENTS IN RESPECT TO THE DELINQUENT TAX TOLL (PR 4, 16) AND IN RESPECT TO APPELLEE'S EXHIBIT 2 (PR 190) (Points 3, 4, 5, 6, 7, 8, 10, 11, 12, PR 257-258), AND IN THE PRETENDED ASSESSMENT AND LEVY OF THE CLAIMED TAXES.

Appellants supplement their argument on this their First Proposition herein by their argument and the

judicial decisions and legal principles in their argument on their Second Proposition in Case No. 13,455 (Bf. 13,455, pp. 64-68), which was before this Honorable Court resulting in its Opinion of July 8, 1953 (206 F2d 612).

Heretofore herein (p. 5 supra) Appellants pointed out the similarity of the delinquent tax roll (PR 4, 16) to the delinquent tax roll for 1948 and 1949 taxes (PR 9-10; 13, Cases 13,455 and 14,562) which this Court held to be invalid in its said Opinion of July 8, 1953.

Appellee itself impliedly confessed its incorrectness otherwise why did it attempt to extrinsically impeach it and show purported additional facts by its incompetent, inadmissible Exhibit 2 (PR 190)?

The delinquent tax roll (PR 4, 16) lumps the taxes for each year of 1950 and 1951 without segregation of realty and personalty taxes; and lumps the two years penalty and interest together; shows no millage rate; and assesses the taxes, penalty and interest for the two years against Bellingham alone, although it had no interest in either the personalty or the realty until May 5, 1951 (PR 204). It is impossible from its face to compute the amount of taxes, penalty and interest upon realty alone or upon personalty alone for either or both of the two years.

Nor does Appellee's Exhibit 2, whose inadmissibility and incompetency is later discussed (Second Proposition, pp. 24-31 infra), aid in doing so; in fact, it adds nothing, other than stating "16 mills" on the

line opposite "1950-1951" and "1951". No name or address is written on the line opposite either "1950-1951" or "1951"; in fact Bellingham's name doesn't appear anywhere on Exhibit 2, except outside on the margin appears "Y&SSR" and "Bellingham", in the section headed "1951".

Appellee admitted (PR 195-200) Appellants' Objections 1, 2, 3, and 4 (PR 5-6) and 9 (PR 8) but claimed it had posted a notice (PR 200); also that no assessor had been appointed for 1950 or 1951, and that Appellee's Board of Trustees acted as its own assessor, and that the assessment for 1950 and 1951 had been carried from 1949, and that no person had been appointed by official action to post any notice or present the delinquent tax roll, other than by Appellee's ordinance, and that true and correct copies of Ordinances 1 and 2 are in the trial Court's Case No. 6581-A (PR 85-102, Cases 13,455 and 14,562).

Municipal Ordinance 1 (Appendix, pp. i-xvii; Ordinance 2 not being included because it was for 1948 only), which was in effect for tax years 1950 and 1951 (PR 40, 90, 117, 296) does not provide for posting any notice, but for publication only (Sec. 17, pp. xiv-xv, Appendix, infra).

Exhibit 2 (PR 190) does not show, nor was any evidence adduced, that the assessor or anybody made the affidavit required by Sec. 4, Municipal Ordinance (Appendix, pp. ii-iv infra), or that he ever took the oath required of all city officers by Sec. 16-1-54, ACLA 1949 (Bf. 13,455, p. 20).

Appellants submit that the evidence (Bf. 13,455, p. 20), shows Appellee's nonperformance of the statutory provisions of Sections 16-1-121 and 16-1-122.

The record contains no evidence of any listing or assessing by the assessor as required by Sec. 16-1-65, ACLA 1949, and Ordinance 1 (Appendix, pp. i-xvii infra) which admittedly was in effect for 1950 and 1951 (PR pp. 40, 90), and its Section 3 provides that the assessor shall annually list and assess the property.

Appellants submit that the provision in Sec. 16-1-122, ACLA 1949 (Bf. 13455, p. 8), i.e.: cities of not more than 1500 inhabitants may post, not publish, the notice of presentation of delinquent tax rolls, doesn't authorize Appellee to post such notice when its effective Ordinance (Appendix, pp. x, xv infra) provides the notice shall be published.

No evidence was adduced of even a resolution having been enacted to authorize posting, instead of publishing; in fact, no positive evidence even of posting.

This Honorable Court held that a general ordinance relating to taxes couldn't be amended by resolution.

Valentine v. Juneau, 36 F2d 904, 5 AFR 467, 471.

By its admission (PR 195-200) of Appellants' Objections 1, 2, 3, and 4 (PR 5-6), Appellee admitted no official action was taken.

The evidence clearly shows Appellee's nonperformance of the statutory provisions of Sections 16-1-54, 16-1-65, 16-1-112, 16-1-121, 16-1-122, and 16-1-123,

ACLA 1949 (Bf. 13,455, pp. 20, 4-5; 6-10) and the ordained provisions of Sections 3, 4 and 17, Municipal Ordinance 1 (Appendix, pp. i-xvii infra).

The trial Court said: "Now, I know there have been a lot of irregularities here."

In its Memorandum Decision (PR 118), filed June 10, 1954, it held in effect that no substantial rights of Appellants had been affected.

Appellants submit that all the authorities, cited to this Honorable Court in Cases #13,455 and 14,562 (Bf. 13,455, pp. 65-78), support their contention that these irregularities and failure to comply with the provisions of Sections 16-1-54, 16-1-65, 16-1-122, 16-1-121, and 16-1-123, ACLA 1949 (Bf. 13,455, pp. 20; 4-16), and of Appellee's Ordinance (Appendix, pp. i-xvii infra) have affected, even lost them, their substantial rights.

The U. S. Supreme Court, in a suit wherein a tax title was in controversy, said of the following irregularities:

1. No valid assessment for the year in question
   a. Because the assessor did not take and subscribe the statutory oath or affirmation.
   b. Such oath not endorsed upon the assessment books prior to their delivery to the assessor, as required by statute.
2. Failure to publish notice.
3. Failure of the Clerk to certify at the foot of the list of delinquent taxes, the name of the newspaper said list was published in, the date of publication, and the length of time.

4. Failure of the Clerk to attend the sale and make a record in a substantial book, etc.
5. Failure of the Clerk to take the property off the tax roll for the reason that it had been struck off by the state.
6. Failure of the Clerk to deliver to the Collector the tax book, with his warrant attached, thus authorizing the Collector to collect the taxes.
7. Failure of the collector to post notices (printed) of his attendance at certain places to receive the taxes, etc.
8. Failure of the collector to furnish a list to the Clerk of all such taxes that he had been unable to collect, for the purpose of striking from the tax list any exempt property.

"In the present case, it is contended by the appellant that the irregularities alleged by the Appellee were cut off under Section 5791 (Statute of Limitations), because they commenced no suit within two years from the date of the sale. But those irregularities deprived the appellees of a substantial right, and were not technical objections to the sale, and were prejudicial to the appellees."

Martin v. Barbour, 140 U.S. 634, 643.

These irregularities before the U. S. Supreme Court are similar to, in fact, some of them are identical with, those committed by Appellee in respect to the Delinquent Tax Roll (PR 4, 16).

As stated by the U. S. District Court, W. D. Arkansas, wherein one of the irregularities was the

County Clerk's failure to attach his warrant to the tax books delivered to the Collector,

> "The provisions of the law made for the protection and benefit of the taxpayer are mandatory."
>
> *Conn. v. Little, et al.,* 101 F. Supp. 683, 684.

Appellants submit that the provisions of all of said statutes as well as of said Municipal Ordinance are for the benefit of the taxpayer, and that their performance is jurisdictional.

The publication of the notice of sale only once instead of three times as prescribed by Ordinance, was held a fatal defect in the proceedings:

> *McCaslin v. Hamlin,* 223 P2d 326, 327, 328,

so here the failure to perform the statutory and municipal ordinance requirements not only affected Appellants' substantial rights but also is a fatal defect in these proceedings, and, as said by Judge Jennings, the trial Court had no jurisdiction until its action had been invoked in accordance with Sections 16-1-122 and 123 (Bf. 13,455, pp. 7-10).

> *In re Delinquent Tax Roll,* 4 Alaska 721, 723, 726 (Bf. 13,455, pp. 65-66).

Moreover, Section 16-1-65, ACLA 1949 (Bf. 13,455, p. 20) mandatorily requires:

> "The assessor shall once each year, at such time as the Council may direct, duly list and assess all the taxable property of the city at its just and fair value."

That statute was made applicable to Appellee by Section 16-2-5, *ibid* (Bf. 13,455 pp. 2-3). Congress changed the words "just and fair" to "true and full value" on June 3, 1948.

Sec. 48-1-1, *ibid* (Bf. 13,455 pp. 21-22).

Sections 2, 3, and 4, Municipal Ordinance (PR 83-88), likewise require the assessor to make an annual listing and assessment, which the evidence shows was not done for either year.

SECOND PROPOSITION.

APPELLEE'S WITNESS HENRY'S EVIDENCE (PR 177-206), TESTAMENTARY AND DOCUMENTARY, EXHIBIT 2 (PR 190), WAS INCOMPETENT AND INADMISSIBLE TO EXTRINSICALLY EITHER IMPEACH OR SHOW FACTS NOT DISCLOSED BY THE DELINQUENT TAX ROLL (PR 4, 16) (Points 10, 11, 12, PR 258).

Appellants submit that Henry's testimony, with its documentary evidence (PR 19), was incompetent and inadmissible. It was admitted over their objection (PR 187-188). The document's vagaries were heretofore discussed (pp. 11-15 supra). It has no name opposite "owner" or address opposite "address" in either section "1950-1951" or "1951". Under the column "Board", not "assessor's", for "1950-51" appears on the line opposite land "11,000"; on the line opposite improvements, "176,125"; on the line opposite personal, "94,000"; on the line opposite "total" "281,625.00". Under the column "Tax" on the line opposite Total appears "4498.00". For "1951" under the column "Board", not "Assessor's", appears on

the line opposite land "11,000", on the line opposite improvements, "176,625"; on the line opposite personal, "94,000"; on the line opposite total "281,-625.00". Under the column "Tax" on the line opposite Total appears "4506.00". Nowhere does Bellingham's name appear as owner, or even appear other than outside of the margin opposite Section "1951" appear "Y&SSR" and "Bellingham." Nowhere on it appear the sums shown as taxes on the delinquent tax roll (PR 4, 16).

Appellants challenged its competency in their objections of June 24, 1954 (PR 121) also in their Motion for New Trial (PR 135); also, on numerous occasions in Case No. 14,562 (trial Court No. 6581-A).

The duplicate delinquent tax roll which is presented to the Court is the primary record. After the hearing, the original is to be corrected from the duplicate, not the duplicate from the original (Sec. 16-1-126, ACLA 1949; Bf. 14,355, p. 12).

No Statutory Authority Exists to Amend, Enlarge, or Impeach by Extrinsic, Aliunde, or Other Evidence a Duplicate Delinquent Tax Roll Presented to the Court, or to Present a New Duplicate Delinquent Tax Roll.

The common definition of an assessment or tax roll or list is:

> "While it seems that a paper or warrant containing a tax against a single place only may be regarded as a 'tax list' within the meaning of certain statutes, an assessment or tax roll or list

appears ordinarily to be a completed record for the year of all the taxable persons and property within the tax district, so arranged and itemized as to show to each taxpayer who may examine it exactly what property he is assessed on and the amount of tax he is required to pay thereon, although it may perform other functions."

84 *CJS* 888, Sec. 454.

"An assessment list or roll can be made with proper legal effect only by the particular board or officer designated by the statute."

Ibid, Sec. 455, p. 888.

Appellants submit no distinction exists between adding omitted property to a delinquent tax roll than to offer evidence to show that real and personal property taxes, instead of being lumped, were assessed separately and segregated.

An assessor may not add omitted property to the assessment roll unless authorized by statute.

Ibid, p. 957, Sec. 508.

The delinquent tax roll (PR 4, 16) shows realty and personalty taxes lumped together in one sum for 1950, also for 1951; penalty and interest each lumped in one sum for the two years without showing the penalty or interest separately against either the realty or personalty taxes, or for the separate years.

Exhibit 1 doesn't aid in computing the sums shown on the delinquent tax roll.

The Order of Sale (PR 128-129) allowed for 1950 realty taxes of $2,033.20 and for 1951 of $1,631.35.

Neither of those sums appear on the delinquent tax roll (PR 10, 16) nor on Exhibit 2 (PR 190).

No other evidence than Henry's was adduced in support of the delinquent tax roll (PR 4, 16), which is not competent or admissible evidence.

The rule is, in order to sustain an addition of property by tax assessors as omitted, it must appear that the items added were not assessed in the original assessment.

Ibid, p. 959, Sec. 508.

Even where reviewing boards or officers are authorized by statute to make corrections in the assessment roll, they must do so strictly in accordance with the statutory provisions.

Ibid, p. 998, Sec. 520.

Here there is no statutory authority for any one to make any corrections in the duplicate delinquent tax roll.

This same principle is also laid down in

Ibid, p. 1002, Sec. 521,

and in

Ibid, p. 1006, Sec. 522.

Section 16-1-122, ACLA 1949, specifically provides that which shall be contained in the delinquent tax roll, viz.:

> "Such roll shall show therein the property assessed, the amount of the tax due, penalty and interest, separately stated on each tract assessed, to whom each tract is assessed, if assessed as unknown, so stated."

The facts stated in the roll are conclusive. Appellee seeks by Exhibit 2 to establish other facts and to impeach the roll.

The Delinquent Tax Roll itself is the best evidence.

Ronkendorff v. Taylor, 7 L.ed. 882;

84 *CJS* 758, Taxation, §395;

Brink v. Dann, 144 NW 734, 736.

The only changes in it that the statute authorizes are payments made during time of publishing or posting and up to time of sale, Sec. 16-1-122, ACLA 1949 (Bf. 13,455, p. 8), which must be endorsed upon both the original and the duplicate, and proportionate share of costs by the Clerk of the District Court on the duplicate. Sec. 16-1-125, ACLA 1949 (Bf. 13,455, p. 12).

> "Extrinsic evidence is not admissible to establish facts which can be evidenced only by the assessment roll."
>
> 84 *CJS,* p. 922, §485.

No statutory authority exists to correct any error in the roll by showing what the Appellee now claims is the correct amount of taxes that should have been assessed against the real property only.

Ibid, Sec. 520, p. 998, supra.

> "The necessity, sufficiency, correction, and preparation of duplicate lists or rolls depend on statutory provisions."
>
> *Ibid,* Sec. 842, p. 920.

> "Tax records and documents are commonly considered conclusive and not subject to impeachment by parol evidence."
>
> 32 *CJS* p. 806, Sec. 883.

Affidavit of Service of notice to redeem from tax sale cannot be aided by parol.

Geil v. Babb, 242 NW (Iowa) 34.

Assessment roll. Insufficient description of land on assessment roll cannot be aided by extrinsic evidence, and name listed under heading of "owner" cannot aid description.

Ransom v. Young, 168 So. (Miss.) 473.

Plat book of an assessor cannot be impeached or varied by parol evidence as to the description of land.

Blayden v. Morris, 214 P. (Idaho) 1039.

Record of board of assessors, which is duly kept pursuant to statutory requirement, generally cannot be varied or added to by other evidence.

Carbone, Inc., v. Kelly, 194 N.E. (Mass.) 701.

Records of county commissioners as to whether a tract of land is seated or unseated and has been assessed, taxed, and sold by the treasurer cannot be varied by parol testimony or by the private record of an assessor.

McCall v. Lorimer, Pa. 4 Watts 351.

See also:

Trustees of St. Paul Methodist Episcopal Church South v. District of Columbia, 212 F.2d 244;

Tumulty v. District of Columbia, 69 App. D.C. 390, 400, 102 F.2d 254, 264;

Atchison, T. & S. F. Ry. Co. v. Elephant Butte, Irr. Dist., 10 Cir. 1940, 110 F.2d 767, 773;

Cooley, Taxation, Vol. 3 (4th Ed. 1924), 1046.

No evidence was adduced that the assessor, if there was one, which Appellants deny, ever made and subscribed an affidavit to Exhibit 2 (PR 190), if it is construed to be the assessment book, as required by Section 4, Municipal Ordinance (Appendix, pp. ii-iv infra) or that he annually and for either tax year 1950 or 1951 listed and assessed the property at its true and full value, as required by Sec. 3, *ibid* (Appendix, pp. ii infra), and by Sec. 16-1-65, ACLA 1949 (Bf. 13,455, p. 20), or that he took an oath of office as required by Sec. 16-1-54, *ibid* (Bf. 13,455, p. 20), or that he made or prepared Exhibit 2 (PR 190), which upon its face purports to show that the figures thereon are those of the Board, not of the Assessor, because no figures are under the column headed "Assessor's." They are under the column headed "Board," notwithstanding Sec. 3, Municipal Ordinance (Appendix, pp. ii infra), required the assessor to make the assessments. Therefore, the Exhibit 2 (PR 190) is not prima facie evidence of any listing, assessment, valuation or levy because on its face, with no proof to the contrary, it shows compliance with neither statute nor ordinance. Similarly, the Delinquent Tax Roll is not prima facie evidence of any assessment or levy for either tax year, because of nonperformance of statutory and municipal requirements.

People v. San Francisco Savings Union, 31 Cal. 132, 138.

National Distillers, etc., v. Board, etc., 256 SW 2d 481, 484.

84 CJS 752, Taxation § 392.

"Presumptions and burden of proof. As in other civil cases, the burden is on the plaintiff to establish a prima facie case and on the defendant to overcome it, and to establish his affirmative defenses. In a suit to enforce a tax lien, the burden is on plaintiff to show that the tax was legally assessed, legally committed to an officer for collection, and that the defendant was the owner or in possession of the land . . ."

85 CJS 83, Taxation §780.

THIRD PROPOSITION.

THIS HONORABLE COURT'S OPINION OF JULY 8, 1953 (206 F2d 612), IS THE LAW GOVERNING THIS PROCEEDING AND ITS MANDATE OF AUGUST 19, 1953 (PR 335-337, CASE 14,562), IS RES JUDICATA OF THIS PROCEEDING (Point 1, PR 256).

This Court in its Opinion (206 F2d 612) characterized this kind of a proceeding as a special proceeding; in fact, it is so characterized by the statute itself. Sec. 16-1-122, ACLA 1949 (Bf. 13,455, p. 7). In that Opinion this Court said:

"If the amount were separately stated in the delinquent tax roll filed by the city with its application for order of sale, it would be presumed that the realty was properly assessed and that the amount stated remains unpaid."

206 F2d 612, 616.

The amount has never been stated in any delinquent tax roll (PR 4, 16); nor in Appellee's Exhibit 2 (PR 190). That delinquent tax roll admittedly was

not prepared or presented in accordance with statutory or municipal ordinance requirements.

See: First Proposition, pp. 17-24, supra.

The Order of Sale (PR 128-129) says the delinquent realty taxes for 1950 are $2033.20; for 1951, $1631.35. The delinquent tax roll (PR 4, 16) says combined delinquent realty and personalty taxes for 1950 are $2,021.20; for 1951, $1,639.65. Exhibit 2 says combined realty and personalty taxes for 1950-1951 "4498.00"; for 1951, "4506.00" (PR 190). Based upon it, 16 mills for 1950-1951 upon "11,000" land and "176,125" improvements, assuming dollars are meant, would amount to $2994.00; for 1951, upon "11,000" land and "176,625" improvements, assuming dollars are meant, would amount to $3002.00. The record nowhere shows the sums of $2033.20 or $1631.35, which are mentioned in the Order of Sale (PR 128-129). They are arrived at in some manner by Appellee's counsel's computations.

Appellants submit that the principles announced by the United States Supreme Court and this Honorable Court and other Courts in many decisions clearly sustain their contention.

This Honorable Court's opinion of July 8, 1953 (206 F2d 612) said that "the amount of taxes, penalty, and interest due upon realty alone is not shown in the record", and was not separately stated in the delinquent tax roll, which is true herein, too.

Here the parties are the same as in Cases 13,455 and 14,562, except the assessment for both years in the delinquent tax roll (PR 4, 16) is against Bellingham only although it had no interest in the properties involved until May 5, 1951 (PR 204); the assessments are the same according to Appellee's counsel (PR 196), but the amounts are different because now the claimed millage rate is 16 mills; and Appellee failed to perform the same statutory and ordinance requirements, and further contrary to Section 17 of its Ordinance (Appendix, pp. xiv-xv infra) did not publish the notice of the delinquent tax roll, but claimed to have posted it (PR 200).

In *Harvey Coal Corporation v. U. S.,* Ct. Cl., 35 F. Supp. 756, wherein are cited *Cromwell v. County of Sac,* 94 U.S. 351, and *Tait v. Western Maryland Ry. Co.,* 289 U.S. 620, the Court said, at p. 762:

> "The two proceedings, involving taxes for different years, are not the same, but the parties are the same and the question presented in this suit was before the Board, it was necessary for its decision; and it was decided by the Board. In such case, it is well settled that the Board's decision is res judicata in this proceeding."

See, also:

New Jersey v. Martin, 115 F2d 968, 973;
W. H. Atkinson Co. v. Brown, 300 NW (Mich.) 102, 103.

The judgment "is a finality as to the claim or demand in controversy, including parties and

those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, *but as to any other admissible matter which might* have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive as far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever." (Emphasis supplied.)

Cromwell v. County of Sac, 94 US 351, 24 L.ed. 195, 197, 198;

New Orleans v. Citizens Bank, 167 US 371, 396, 398.

FOURTH PROPOSITION.

THE ORDER OF SALE (PR 128-129) DISREGARDS APPELLANTS' UNCONTRADICTED, UNIMPEACHED, COMPETENT EVIDENCE AS TO THE TRUE AND FULL VALUES OF THEIR RESPECTIVE PROPERTIES; IS BASED UPON WITNESS HENRY'S INCOMPETENT, INADMISSIBLE EVIDENCE (PR 177-206), TESTAMENTARY AND DOCUMENTARY, EXHIBIT 2 (PR 190); AND IGNORES APPELLEE'S FAILURE TO PROVE THE TRUE AND FULL VALUES OF APPELLANTS' RESPECTIVE PROPERTIES, EITHER REALTY OR PERSONALTY, FOR EITHER TAX YEAR 1950 OR TAX YEAR 1951 (Points 2, 5, 7, PR 256-258), AND TO COMPLY WITH STATUTORY AND MUNICIPAL REQUIREMENTS.

The trial Court considered, in support of Appellants' Objections to the Tax Roll herein, the evidence adduced in Cases 13,455 and 14,562 (trial Court No. 6581-A) in support of the Tax Roll therein (Minute Entry of June 29, 1954, PR 125); therefore, Appellants supplement and adopt, as a part of this brief, and in support of this their Fourth Proposition herein, pages 78-86 of their brief in Case 13,455.

Appellee admitted (PR 172) there was no dispute as to the amounts paid or valuations claimed by Appellants (PR 172), which payments and valuations are set out in their Objections of September 8, 1952 (PR 11-12), viz.: for 1950, Railway $1,699.20 upon realty valuations of $99,000 and upon personalty valuation of $7,200.00 and Libby $785.60 upon personalty valuation of $49,100, payments being based upon 16 mill rate; for 1951, Railway $1,665.22 upon realty valuation of $99,000 and upon personalty valuation of $7,200, and Bellingham $1,201.13 upon personalty valuation of $76,603, payments being based

upon 16 mill rate but 2% discount being taken because payment made in full prior to delinquency.

Appellee admitted (PR 207-208) that Appellant Railway's and Bellingham's witnesses testified before the Board of Equalization in the fall of 1951 as to their valuations. Their total valuation of $182,-803 is also shown by Bellingham's letter (PR 44-45) of December 7, 1951, and that those witnesses had testified to them before the Board on October 30, 1951, which was admitted by Appellee's Answers 25 and 26 (PR 90).

Appellee also admitted Bellingham paid on May 5, 1951, $100,000 for property within Appellee plus $80,000 for inventory (PR 203-204).

Appellee also admitted by its Answers 22 and 23 (PR 90) Appellants Railway's and Libby's payments for 1950 made by its attorney and that the properties claimed total value was $155,300 (PR 40-42).

The figures of realty taxes $2,033.20 for 1950 and realty taxes $1,631.35 in the Order of Sale (PR 128-129) do not appear in either the Delinquent Tax Roll (PR 4, 16) or Exhibit 2 (PR 190); in fact, Appellants can't find those figures anywhere in the record except in the Order of Sale.

Admittedly (pp. 20-21 supra), Appellee did not perform the jurisdictional acts required by the statutes and municipal ordinance.

Appellee contended, which Appellants do not concede, that they had not exhausted their administrative remedy (PR 172). Neither the trial Court's Memorandum Decision (PR 118), the Order of Sale (PR 128-129), nor elsewhere does the record show what, if any consideration, the trial Court gave to that contention.

In any event, Appellants submit that Appellee's nonperformance of statutory and ordinance jurisdictional steps made it unnecessary for them to do anything.

They contend that Sec. 7, Municipal Ordinance (Appendix, pp. v-vi, infra) is not authorized by Sec. 16-1-122, ACLA 1949 (Bf. 13,455, pp. 4-5), nor that noncompliance therewith limits the trial Court's jurisdiction under Sec. 16-1-124, ACLA 1949 (Bf. 13,455, pp. 10-12), to hear and determine, according to equitable principles, whether any tract was over-valued or over-assessed or whether the Board of Trustees had acted in bad faith.

Appellee is a public corporation, a political subdivision of the Territory. It has only such legislative powers as the Territory delegates to it. It is not an administrative body.

Appellants submit that, if the rule re exhaustion of administrative remedies applied, which they don't concede, the trial Court abused its discretion in holding that Appellants have no right to challenge the validity of the claimed taxes because of that rule when Ap-

pellee failed to make the assessment in the manner provided by statute and ordinance.

The application of that rule is a matter of judicial discretion.

> "Whether it should have denied relief until all possible administrative remedies *were* exhausted was a matter which called for the exercise of its judicial discretion."
>
> *U. S. v. Abilene, etc., Co.*, 265 US 274, 282.

Appellants submit that the Order of Sale (PR 128-129) is equally as invalid as the Order of Sale which this Honorable Court reversed in its Opinion of July 8, 1953 (206 F2d 612), and that the trial Court should have found under the provisions of Sec. 16-1-124, ACLA 1949 (Bf. 13,455, p. 11) that Appellants' respective properties had been over-valued and over-assessed $125,825.00 for 1950 and $98,822.00 for 1951, and that the Board of Trustees had not equalized the assessments in good faith.

While the differences in tax sums between those in the Delinquent Tax Roll (PR 4, 16) and those in the Order of Sale (PR 128-129) may be contended to be small, yet the principle applies:

> "The excessive levy is in fact small and trifling, * * * 'The smallness of the amount of the excess over the amount due does not, in a tax sale, affect the question, as the maxim, De minimis non curat lex, does not apply to tax sales. The provisions of the law made for the protection and benefit of the taxpayer are mandatory' * * *

"In McCullouch v. Maryland, 4 Wheat. 316, 17 US 316, 429, 4 L.ed. 579, Chief Justice Marshall stated, 'that the power to tax involves the power to destroy.' This principle is pertinent when there is no power to tax or when the amount of the tax is not authorized. The right to extend a tax levy is dependent upon the authority to extend the specific tax at the legal and authorized rate."

Conn v. Little, et al., 101 F.Supp. 683, 684, 685.

FIFTH PROPOSITION.

THE ORDER OF SALE (PR 128-129) ALLOWED INTEREST ON CLAIMED TAXES ALTHOUGH APPELLEE'S TAX ORDINANCE (Appendix, pp. i-xvii infra [Sec. 12] IMPOSED OR FIXED NO SPECIAL RATE OF INTEREST PAYABLE THEREON; ALLOWED APPELLEE AN ATTORNEY FEE CONTRARY TO LAW AND DESPITE APPELLEE HAD COMMITTED "A LOT OF IRREGULARITIES" AND THE STATUTE (Sec. 16-1-124, ACLA 1949; Bf. 13,455, p. 11) REQUIRED THE ADJUSTMENT OF THE ASSESSMENT ON EQUITABLE PRINCIPLES; AND APPLIED, CONTRARY TO APPELLANTS' SPECIFIC INSTRUCTIONS (PR 40-45), BUT AS SELECTED BY APPELLEE, RAILWAY'S AND LIBBY'S PAYMENTS OF $1,699.20 AND $785.60 FOR 1950 TAXES (PR 11) AND RAILWAY'S AND BELLINGHAM'S PAYMENTS OF $1,665.22 AND $1,201.13 FOR 1951 TAXES (PR 12). (Points 9, 13, 14, PR 258-259).

1. The Order of Sale (PR 128-129) held Appellants are "delinquent for a balance due on real property taxes as follows: for the tax year 1950, $2,033.20, plus a penalty of 12%, being $243.98, and interest at 1% monthly since the delinquent date of December 15, 1950, *on balance of delinquent tax,* being interest of

$874.28; and for 1951 tax year $1,631.35, plus penalty of $195.76 and interest since December 15, 1951, at 1% monthly on *delinquent balance of tax,* being the sum of $498.41; being assessed against "Appellants' real property". (Emphasis Supplied.)

None of these figures appear in the Delinquent Tax Roll (PR 4, 16), or in Exhibit 2 (PR 190), or elsewhere in the record.

The Delinquent Tax Roll (PR 4, 16) doesn't state that either the $2,021.20 1950 tax or the $1,639.65 1951 tax is on realty alone, or what part of either sum is for personalty taxes, nor does it segregate either penalty or interest as to either years, personalty or realty, or ownerships.

Exhibit 2 (PR 190) under the column headed "Tax" on the line opposite "Total" shows in section "1950-51" "4498.00" and in section "1951" "4506.00". Multiplying 187,125 (11,000+176,125) by 16 results in 2994 not $2,021.20 for 1950, and multiplying 187,625 (11,000+176,625) by 16 results in "3002" not $1631.35 for 1951.

While Appellants do not concede its competency, clearly evidence outside of the record must be used to arrive at the respective sums of $2033.20 and $1631.35 in the Order of Sale (PR 128-129).

See: *Conn v. Little, et al.,* 101 F. Supp. 683, 684, 685, supra, as to inapplicability of maxim, De minimis non curat lex.

Sec. 16-1-112 ACLA 1949 (Bf. 13,455, pp. 4-5), authorizes Appellee's Board of Trustees "to impose,

fix and provide for the collection of penalties for nonpayment of taxes when due, not to exceed 15% of such tax, and to fix the rate of interest on delinquent taxes and penalties, not to exceed 12% per annum."

That section as well as Sections 16-1-111 through 131, Section 16-1-33, 16-1-54, 16-1-63, 16-1-65, 16-4-1, and 48-1-1, ACLA 1949 (Bf. 13,455, pp. 4-22), were extended to Appellee, which is a second class Alaskan municipality, by the 6th Paragraph, Section 16-2-5, ACLA 1949 (Bf. 13,455, pp. 2-3).

Section 12, Municipal Ordinance (Appendix, p. ix infra), provides: "On all delinquent taxes a penalty shall be added, which shall be at a sum equal to interest at the rate of 12% per annum from the date of such delinquency".

Appellee's Municipal Tax Ordinance (Appendix, p. xvii infra) nowhere else imposes or fixes either interest or penalty upon delinquent taxes.

The quoted Section is ambiguous; hence, should be construed most favorably to Appellants.

> "In taxing statutes, doubts are resolved against the government."
>
> 51 *Am. Jur.,* p. 616, § 650;
>
> *Gould v. Gould,* 245 US 151, 153;
>
> *U. S. v. Merriam,* 263 US 179, 187-188.

At most under the quoted Section, only 12% per annum from the date of delinquency can be allowed upon legally listed and assessed taxes if any are delinquent which there are not.

2. The Order of Sale (PR 128-129; 389) allowed "Costs of this hearing, including an attorney's fee to applicant of $923.40 as for contested lien cases according to local rule No. 45."

This Honorable Court held this proceeding to be a special proceeding. 206 F2d 612.

Sec. 16-1-125, ACLA 1949 (Bf. 13,455, p. 12), provides for the allowance of *"the costs of publication of notice and hearing before the Court."*

It makes no mention of an attorney's fee; hence, no attorney fee is allowable to become a lien upon Appellant Railway's realty. Costs of hearing undoubtedly mean witness fees and expenses of depositions, not attorney's fee for preparing application, notices, and proofs thereof.

The right to recover costs, including attorney fees, is statutory.

> *Mutual, etc., Ass'n. v. Moyer,* 94 F2d 906 (CAA 9) 9 Alaska Reports 235, 240, cer. den. 304 US 581;
>
> *United Benefit Life Ins. Co. v. Elliott, et al.,* 11 Alaska Reports 466, 476.

Alaska has a general statute, no other, under which an attorney fee can be allowed as an item of costs, viz.:

> "Disbursements allowed to party entitled to costs. Party's right to witness' and attorney's fees. A party entitled to costs shall also be allowed for all necessary disbursements, * * * and

a reasonable attorney's fee to be fixed by the Court."

Sec. 55-11-55, ACLA 1949.

"And a reasonable attorney's fee to be fixed by the Court" was included in that statute by amendment in 1947.

Ch. 84, ASL 1947.

The same words in Section 1, Ch. 38, ASL 1923, were construed by this Honorable Court in

Pond v. Goldstein, 41 F2d 76, 5 AFR 544, 556;
Forno v. Coyle, 75 F2d 692, 5 AFR 758, 766.

Inasmuch as this is a "special proceeding", Appellants submit that, without specific statutory provision, costs, as stated, do not include an attorney's fee.

The trial Court allowed attorney fees herein to Appellee although on July 28, 1954, it said, "I know there have been a *lot of irregularities here. There naturally would be"* (PR 223), (emphasis supplied), and, previously, in Case No. 13,455, in respect to the trial of January 18, 1952, had held "No attorney fee was allowed because of irregularities on the part of Yakutat of the kind that encourage litigation" (PR 30, No. 13,455).

Appellants submit that Appellee's irregularities in each proceeding consisted of failure to perform jurisdictional acts required by statute and municipal ordinance.

It should be borne in mind that though Appellee may be a small village and a second class Alaskan

municipality, it has throughout been represented by learned practicing counsel, William L. Paul, Jr., of Juneau and Seattle, and Frederick Paul of Seattle. This proceeding, no more than the suit No. 6302-A, which resulted unsuccessfully to Appellee (PR 157), was not instituted by men ignorant of or unlearned in the law.

The allowed attorney fee of $923.40 was based upon the fee allowed as in contested lien cases under Local Rule 45, actually under Rule 45 of Uniform Rules of the District Court for the District of Alaska, effective April 30, 1953, adopted by all the District Judges of Alaska. It provides for allowance in a contested lien case of 30% on first $1000, 15% on next $4000, and 5% on next $5000, etc.

It apparently is computed upon the total sum of $5467.98 (1950 tax $2033.20+penalty $243.98+interest $874.28+1951 tax $1631.35+penalty $195.76+interest $489.41), although as hereinabove stated Appellee's Ordinance (Appendix, p. x infra) does not impose or fix any specific rate of interest on delinquent taxes; hence, the fee is partly based upon a sum of illegal interest.

Appellants submit the trial Court abused its discretion in allowing an attorney fee in the face of the "lot of irregularities" (PR 223) committed by Appellee and its admitted failure to perform the required jurisdictional acts (pp. 20-25, supra), and that the statutes do not authorize its imposition against the realty of Appellant Railway who was not even named in the Delinquent Tax Roll (PR 4, 16).

3. The Order of Sale (PR 128-129) inferentially, although not specifically so stating, must have approved or adopted, without evidence thereof, one or more of the methods of application suggested by Appellee's counsel, to the full payment of personalty taxes for 1950 and 1951, leaving unsatisfied realty taxes for 1950 and 1951, of Appellants Railway's and Libby's payments for 1950 made by its attorney (PR 11) and of Appellants Railway's and Bellingham's payments for 1951 (PR 11-12), despite those payments were remitted respectively conditioned that they were in full payment of both realty and personalty taxes (PR 40-45).

Appellee's municipal ordinances (Appendix, pp. i-xvii infra) do not provide for any such application by its attorney or anybody else. Appellee enacted no resolution to do so. Its attorney said, "That is entirely a matter of proceeding in court and I have made the commitment, and it is binding" (PR 193).

Previously he said: "We took all the money which was just generally given us for real and personal property and we applied it for the portion of the proceeding which should not be in the case, for which the City of Yakutat could not apply it—the Bellingham Canning Company on the delinquent tax roll, personal property. Now, we have that choice. Both sides acted in an illegal manner, so one jumps in and tries to correct it. That is all we have done" (PR 163).

Appellee admitted in its answers 22, 23, 24, 25, 26 (PR 90) that Appellants Railway and Libby for 1950 and Appellants Railway and Bellingham for 1951 had

remitted conditioned that they were in full payment of their respective taxes for 1950 and 1951 (PR 40-45).

Appellants deny that any of them have done anything illegal in regard to their taxes or this proceeding, but timely paid all of their taxes upon their respective properties at their true and full values and only seek to prevent payment of taxes at over-valuations and over-assessments without the Appellee's Board of Trustees equalizing them and to prevent the sale of Railway's realty for such unfair, excessive, over-valued and over-assessed taxes.

Appellee's counsel also said: "Well, his direction was to pay real and personal property taxes. He didn't send enough money, so we went ahead and * * * He didn't send enough money because there was a dispute as to valuation of personal property and to valuation of real property, but the application was directed to be made to the personal and real property taxes according to the amount they think is the right amount. There was no specific instruction for so much for personal and so much for real property, except in the sense that the categories are disputed in the amount of valuation. Our position now is that the personal property taxes, when we discovered the illegality of the activity of both sides, we applied in the proper manner, not inconsistent with any instructions given us. The personal property taxes are all paid, and part of the real property, too" (PR 164).

These statements are not sworn evidence. Neither the Delinquent Tax Roll (PR 10, 16) nor Exhibit 2

(PR 190) show credit of any payments. Again Appellants reiterate that their Requests (PR 40-45), which were admitted by Appellee (PR 90), show that their remittances were made conditioned "in full payment of all taxes", and that Appellee retained and did not refund them. Again Appellants deny they have done anything illegal in their taxes or in this proceeding.

In the cool dispassionate atmosphere of preparing sworn Answers to Interrogatories, Appellee's counsel said (PR 95-96): "This means that Bellingham Canning Company has paid its personal property tax and total based upon a $94,000 valuation and the balance of the tax claimed is attributed to the personalty". If it was a misstatement he didn't correct it when it was read to the Court (PR 166).

Appellee's counsel didn't refute (PR 151) his affidavit (PR 114) that Appellants had paid Appellee "a sum more than sufficient to satisfy their personal property taxes, and such sum has been applied by Appellee to pay said personal property taxes, penalty, and interest, and there is nothing due thereon; and this matter concerns on real property taxes, interest and penalty."

Neither the Delinquent Tax Roll (PR 4, 16) nor Exhibit 2 (PR 190) shows credit thereon of payment of any taxes, not even personalty.

Appellants submit that Appellee, by receiving, collecting, retaining, and not refunding their remittances, which were made conditioned that they were in full payment of all taxes, is estopped not only to maintain

that any taxes, either realty or personalty, remain unpaid for either the tax year 1950 or 1951 but also to apply the proceeds of those remittances in any manner other than as directed in Appellants' remittal letters (PR 40-45).

Appellants had the right to direct the manner of application of their payments of $1699.20 and $785.60 for 1950 and of $2866.35 for 1951.

> "In making a payment on account of taxes, the taxpayer has a right to direct its application to a particular tax or to a particular piece or item of property, and the receiving officer is bound by such direction."
>
> Taxation: 84 CJS 1250, §627;
> 61 CJ 970, §1250.

> "When a debtor directs the manner of application of his payment, the creditor, if he accepts payment, must apply it as the debtor requests."
>
> Payment: 48 CJ 646, §90;
> 70 CJS 261, §55.

Appellee should have refunded Appellants' remittances if it did not accept that sum in full payment of Appellants' taxes.

CONCLUSION.

Wherefore Appellants pray that the Order of Sale (PR 128-129) may be vacated and set aside and the application dismissed because:

1. The trial Court was without jurisdiction because of Appellee's nonperformance of statutory and municipal ordinance requirements in respect to the Delinquent Tax Roll (PR 4, 16); also, to Exhibit 2 (PR 190).

2. Appellee's witness Henry's evidence, testamentary and documentary (PR 177-206), was incompetent and inadmissible to extrinsically either impeach or show facts not disclosed by the Delinquent Tax Roll (PR 4, 16).

3. This Honorable Court's mandate of August 19, 1953, issued in Case No. 13,455, is *res judicata,* and this Honorable Court's opinion of July 8, 1953 (206 F.2d 612) in Case No. 13,455, is the law of the case.

4. The Order of Sale of June 29, 1954 (PR 128-129) disregards uncontradicted, unimpeached, competent evidence and its weight and credibility, and is based upon incompetent evidence, including Henry's evidence, testamentary and documentary (PR 177-210), and ignores Appellee's failure to prove the listing and assessing by the City Assessor for the tax years respectively commencing June 1, 1950, and June 1, 1951, at their respective true and full values either the realty or the personalty of Appellants.

5. The Order of Sale (PR 128-129) of June 29, 1954, erroneously allowed interest on claimed delinquent taxes; allowed Appellee an attorney fee and made it a tax lien on Appellant Railway's realty; and inferentially applied, contrary to Appellants' instructions, but as selected by Appellee, their remittances conditioned in full payment of their respective taxes for 1950 and 1951 at the true and full values of their respective properties.

Dated, Juneau, Alaska,
February 18, 1955.

Respectfully submitted,
R. E. ROBERTSON,
ROBERTSON, MONAGLE & EASTAUGH,
Attorneys for Appellants.

(Appendix Follows.)

Appendix.

EXHIBIT "A"

AN ORDINANCE

to provide for the assessment, levy and collection of taxes; and for the sale of property, both real and personal, for the payment of taxes, penalties, interest and costs.

City of Yakutat does ordain as follows:

Section 1. All property within the corporate limits of the City of Yakutat, Alaska, both real and personal, of every nature, not exempt under the laws of the United States, or the Territory of Alaska, is subject to taxation for municipal purposes, and taxes upon such property must be assesed, levied and collected as provided by this ordinance and existing laws and existing ordinances of City of Yakutat which are now or may hereafter be in force.

Section 2. The Board of Trustees shall at its first regular meeting in May of each year appoint an assessor, and he shall at once, on or before the 25th day of May of each year, mail blank assessment forms to each property owner and holder residing in the City of Yakutat, at his request, and to the agents of non-resident property holders, if known, by their request, to whom property has been assessed the previous year, with instructions to list all property owned by them and all property under their control, at 12 o'clock m. on June first of the same year; and it shall be the duty of all owners of property

within the corporate limits of the City of Yakutat to prepare and deliver or mail to the assessor, upon the blanks provided at the office of the Clerk of the City and at such other places as may be designated, a list of all personal property owned by him or under his control within the City of Yakutat, together with the fair value thereof; and a list of all real property owned by him with a description of the same, and a list of all real property under his control as agent for any person, partnership or corporation, with a description thereof; and said statement shall be sworn to before a person authorized to administer oaths and returned to the assessor on or before June tenth of the same year.

Section 3. The assessor must, between the first Friday in May and the second Monday in July of each year, duly list all property in the City of Yakutat subject to taxation for municipal purposes, and he must duly assess such property at its just and fair value, to the person, partnership or corporation by whom it is claimed or owned, or in whose possession or under whose control it was at 12 o'clock m. on the first day of June in the same year; provided, however, that if such name be unknown to the assessor, he shall assess such property to unknown owner; and a mistake in the name of the owner or reputed owner of any such property shall not affect the assessment thereof nor render the same invalid.

Section 4. All property assessed by the assessor shall be listed and described sufficiently for purposes of identification, in a book prepared by the Board of

Trustees for such purposes; and on or before July 20 the assessor must complete his work and his assessment list, and must make and subscribe an affidavit to the assessment book, that the assessment therein contained is a full, true and correct assessment of the taxable property of the City of Yakutat to the best of his knowledge and belief for the current year (specifying it), and must deliver said assessment book together with such oath to the clerk of the City, together with all lists, books, statements, charts and maps relative thereto, and he must take a receipt therefor.

Prior to the delivery of such books to the clerk of the City of Yakutat, the assessor shall notify by postcard each and every person, partnership and corporation whose property has been assessed, in all cases where such persons reside in the City of Yakutat, and in cases where corporations have places of business or offices in the City of Yakutat, stating in such notices, the valuation placed upon the real and personal property of such person, partnership or corporation; and that the assessment list for the year (specifying it) will be filed with the clerk of the City on a certain date (specifying it), and the date, time, and place of the meeting of the Board of Trustees for that year sitting as a board of equalization. Like notices shall be mailed to all agents of non-resident property owners and holders, whether persons, partnerships or corporations, in all cases where the names of such agents are known; and if such property owners do not reside within the City of

Yakutat and have no agent residing therein, then such notice shall be mailed to the last known address of such property owner.

Section 5. The assessor shall receive for his services such compensation as shall be fixed by the Board of Trustees before the appointment of the assessor in each year. In case of the death, resignation or removal from office of the assessor before he shall have completed his work, the Board of Trustees may elect a successor to such assessor who shall complete the work of the assessor as herein provided, and he may certify and make oath to the assessment list as herein provided; and the oath and affidavit of the last appointed assessor shall be deemed a sufficient certification to said assessment book and tax roll; and in all such cases the Board of Trustees shall divide the compensation provided for making the assessment between the several assessors pro rated to the value of the services rendered by each.

Section 6. The Board of Trustees shall meet as a board of equalization on the last Monday of July of each year at the hour of 8 o'clock p.m. for the purpose of examining the assessment list, which shall also be known as the "tax roll" and equalize and revise the assessment for the current year where such equalization and revision is deemed necessary in the judgment of the Board of Trustees; and for the purpose of hearing complaints and protests on the part of taxpayers or owners of property assessed. The board shall adjourn over and continue its sessions from day to day for not less than three days nor more than ten

days, remaining in session not less than two hours each day, during which time it shall complete the revision and equalization of the assessment list for the current year. The Board of Trustees, sitting as a board of equalization, shall have full power, and it shall be the duty of the board to raise or lower the valuation of any property, real or personal, which may be by them deemed unequally or unfairly assessed; and they may add to the assessment list any and all parcels of real property, and any and all personal property, which they may find to have been omitted from such list, and to place a fair, just and correct valuation thereon; and such assessment and equalization of the board of equalization shall have the same effect as though such property had been originally assessed by the duly appointed assessor. The clerk of the City of Yakutat shall be ex-officio clerk of the board of equalization and he shall keep a record of the proceedings of the board and note all changes made in the assessed valuation of the board.

Section 7. Any person, partnership or corporation desiring a reduction in the assessment of any property assessed to such person, partnership or corporation, whether real or personal, shall make application to the board of equalization for such reduction. Such application shall be made either in writing, in which case it must be verified by the oath of the person, partnership or corporation desiring such reduction, or by the agent or attorney of such person, partnership or corporation, or such application shall be made before the board of equalization by such owner;

and in all cases the facts upon which the application is based shall be stated before the board, in cases where personal application is made; and they shall be set forth in writing in all cases where written application is made. Before the board of equalization grants the reduction applied for, the person, agent or attorney making the application may be examined on oath touching the value of the property of such person, partnership or corporation on whose behalf the reduction is sought; and no reduction shall be made unless such person or his agent or attorney, or some officer, agent or attorney of a partnership or corporation making the application, attends and answers all questions pertinent to the inquiry. And in all cases where written application for a reduction of assessment is made, the board may require the personal attendance before the board of the person, officer, agent or attorney making the application, or on whose behalf it is made, in order that such person summoned to attend may answer such questions as may be put to him by the board pertinent to the inquiry. For the purpose of such examination the members of the board of equalization and the clerk are authorized and empowered to administer oaths.

Section 8. During the session of the board of equalization it shall be the duty of the assessor to be present and answer, as far as he is able such questions as may be put to him by members of the board concerning the assessment of any taxable property within the corporate limits of the City; and the board may direct the assessor to assess any taxable

property that has escaped assessment, or to add to the amount, number or quantity of property when a false, incomplete or unequal list of assessment shall have been rendered; and to make and enter any assessment, and, if necessary, to cancel previous assessments; provided, however, that in all cases where any assessments are made or property added to the assessment roll, or the value placed on property by the assessor is increased, the owner, his agent, or the possessor of such property, if a resident of the district, shall be given notice of such action, which notice shall be delivered by messenger to such person, owner or agent or possessor of such property, or deposited in the post office, post-paid, addressed to him; and in all cases where the owner of such property is a non-resident, such notice shall be addressed to the agent of such property owner; and all such notices shall be mailed or delivered at least 48 hours before the final adjournment of the board of equalization for the year; and such notice shall state the value placed upon the property assessed, a brief description of such property, and the time when the board of equalization will adjourn for the year.

The clerk of the board shall record in a minute book all changes and corrections made in the assessment list or tax roll, and a record of all orders made by the board during its session relating to such assessment; and during the session of the board, or as soon as possible after its adjournment, he must enter upon the assessment book all changes and

corrections made by the board, and such changes and corrections must be complete within three days after the adjournment of the board of equalization; and the said clerk shall affix to the minute book containing the minutes of the meeting of the board of equalization, a certificate subscribed by him to the effect that he has kept correct minutes of all the acts of the Board of Trustees while sitting on the board of equalization, regarding changes made in the assessment list and tax roll, and to the effect that all changes agreed to and ordered to be made have been made and entered in said assessment book and upon said tax roll, and that no changes have been made upon said list or roll except those authorized by the board of equalization.

Section 9. The Board of Trustees shall meet on the Friday next after the adjournment of the board of equalization and fix the rate of tax levy for the year, designating the number of mills on each dollar of assessed value of property, real and personal, within the corporate limits of the City of Yakutat, for City purposes, as equalized by the board of equalization for that year; and the rate shall not exceed the rate provided by law.

Section 10. Within not more than three days after the day upon which the rate of levy shall have been fixed by the Board of Trustees, as hereinbefore provided, the clerk shall publish a notice specifying:

1st. That the Board of Trustees has fixed the rate of tax levy for the current year, designating the

number of mills fixed on each dollar of assessed value of the property assessed;

2nd. That the taxes are now due and will be delinquent on or before the 15th day of September of that year at 6 o'clock p.m., providing that one-half of the taxes shall not have been paid as in this ordinance hereinafter provided;

3rd. The penalty and interest which will be charged, as hereinafter provided;

4th. The time when and place where payment of taxes may be made;

5th. The amount of discount which will be allowed for payment in full on or before the date specified herein.

Said notices must be published once in a daily or weekly newspaper published and printed in the City of Juneau, Alaska; and posted in three conspicuous places within the City of Yakutat.

Section 11. The clerk is ordered, directed and empowered to collect all taxes for and on behalf of the City, and to do and perform every act and thing necessary and requisite in the collection of said taxes, and to give receipts therefor, and to keep the necessary records of the payment of such taxes.

Section 12. On the 15th day of September in each year at the hour of 6 o'clock p.m., all unpaid taxes shall become delinquent; provided, however, that if one-half of the assessed taxes shall have been paid on or before said 15th day of September in each year

before the hour of 6 o'clock p.m., the remaining one-half of said assessed taxes shall not become delinquent until the 15th day of March of the following year at the hour of 6 o'clock p.m., when the same shall become delinquent; provided, further, that if the taxes on any real or personal property are paid in full on or before the 15th day of September at 6 o'clock p.m. of the year in which they are assessed and levied, a discount of 2% shall be allowed on such taxes; and if such taxes are paid in full on or before the said 15th day of September of the year in which they are assessed. at 6 o'clock p.m., the clerk is authorized, empowered and directed to accept in full payment of such taxes, the amount of the same as levied and assessed, less 2%.

On all delinquent taxes a penalty shall be added, which shall be a sum equal to interest at the rate of 12% per annum from the date of such delinquency.

Section 13. During the period from the 15th day of September in each year to and including the 30th day of September and from the 15th day of March to and including the 30th day of March of each year, the clerk shall make a personal demand on all persons he is able to find to whom personal property has been assessed for the year and upon which taxes have not been paid, for the amount of taxes, penalties and interest upon such personal property; and during the ten days following the 30th day of September and March in each year, the clerk shall make written demand by letter on all such owners of personal property who shall not have been theretofore person-

ally notified, and shall require the owners of such property or the persons to whom the same has been assessed, to pay such taxes, penalties and interest forthwith.

Section 14. All taxes levied by the Board of Trustees pursuant to this ordinance and pursuant to the laws of the Territory, shall be a lien upon all property assessed, and such lien shall be prior and paramount to all other liens and incumbrances against the property assessed; and the owner of all real and personal property assessed shall be personally liable for the amount of taxes assessed against his property, and such tax, together with penalty and interest may be collected, after the same become due, either by distraint or in a personal action brought in the name of City of Yakutat against such owner in the courts of the Territory of Alaska, or both such methods of collection may be used, in the discretion of the school board.

Section 15. That in addition to the provision made for the collection of taxes by personal action against the owners of the property assessed as provided in the last section next above, a lien of personal property taxes may be enforced by distraint and sale of the personal property of the person assessed, and, if the taxes on any personal property, together with the penalty and interest thereon, shall not be paid upon the demand provided in this ordinance to be given by the clerk in the manner hereinabove provided, the Board of Trustees may issue a warrant authorizing and directing the clerk forthwith to seize, levy upon

and distrain and sell such personal property of the person assessed; and the clerk may take the same into his possession and sell the same upon public notice given for a period of not less than ten days, which notice shall be in writing and three copies of which, signed by the clerk, shall be posted in three public and conspicuous places within the City Limits, one of which shall be on the Bulletin Board of the City. The sale of such property shall be made at public auction, and such personal property shall be sold to the highest bidder for cash. From the proceeds of sale of such property the clerk shall pay first the costs and expenses of making such sale, if any, and the cost of the levy and seizure, including any expenses in the removal of said property from the possession of the owner and of keeping and storing same pending the sale, and he shall then retain an amount sufficient to pay the tax, penalty and interest levied against such property, and the remainder of such proceeds, if any, shall be paid to the owner of such property. All sales of personal property under this ordinance shall be made at a time of day to be fixed by the clerk in such notice, and the same shall be fixed between the hours of ten o'clock in the forenoon and five o'clock in the afternoon of the day of sale, and the said sale may be adjourned by the clerk from day to day for want of purchasers or sufficient bids, or if for any valid reason the clerk is prevented from attending at the time and place set for said sale, and the sale may be adjourned and continued from day to day, if necessary, until all of such personal property shall have been sold to pay the costs and expenses herein pro-

vided, and the tax, penalty and interest in full. If the proceeds of sale of such personal property are not sufficient to pay the tax, penalty, interest and costs, then the Board of Trustees may enforce the collection of such tax, penalty, interest and costs by personal action against the owner of such personal property as herein provided in the preceding section, and the Board of Trustees may, in its discretion, employ either or both of said methods for the collection of said taxes, and neither of such methods shall be deemed exclusive remedies.

On any tax sale of personal property, the sale to the purchaser or the highest bidder, shall vest in such purchaser the absolute title to such personal property, and the clerk shall make a return to the Board of Trustees of his proceedings, which shall set forth the date of levy, seizure or distraint, the date of the posting of the notices, places where such notices were posted, the date of the same, the amount received for such personal property, and how such amount was disbursed; and in all cases of sales of personal property, the clerk shall, if requested, give the purchaser a bill of sale on behalf of the City of Yakutat under his hand and the seal of said City.

Section 16. Whenever the tax on any real property assessed and levied pursuant to the provisions of this ordinance or pursuant to the provisions of law, shall not have been paid when due, as herein provided, the same may be collected, together with penalty, interest and accruing costs, and the payment of the same enforced in accordance with the provisions of Sections

1324 and 1325, Compiled Laws of Alaska, 1933, and all amendments thereto.

Section 17. On or before the first of June of each year the clerk shall make up a roll in duplicate of all real property assessed and on which the tax has not been paid and is delinquent. Such roll shall show therein a brief description or statement of the property assessed, which may be described by lot and block number or other description sufficient to identify it, and it shall show the amount of the tax due thereon, together with penalty and interest, separately stated, on such tract assessed, to whom each tract is assessed, if known, otherwise it shall be stated that the owner's name is unknown. The clerk shall endorse under his hand and the corporate seal of the City, upon said tax roll, a certificate to the effect that said roll is a true and correct roll or list of the delinquent taxes of the City for the year or years in which taxes have been levied and assessed, and showing the date when said taxes became delinquent, the total amount of delinquent taxes, penalty and interest, separately stated, and the aggregate of the whole thereof. If the taxes for more than one year be delinquent, such taxes and assessments separately shown, may be included in one tax roll; and, if for any reason the delinquent tax roll is not made up as herein provided for any one year, the same may be made any year thereafter, and shall include all the requirements herein provided for all years during which taxes shall have been delinquent and are unpaid. Said roll, so made up, shall be known as the "delinquent tax roll"

of the City of Yakutat for the year or years for which the same is made up, the original of which shall be filed with the clerk and remain in his office open to the inspection of the public. As soon as the clerk, or such other officer as may be designated by the Board of Trustees, shall, under the direction of the Board of Trustees, cause to be published in a newspaper of general circulation published within the City of Juneau, Alaska, either weekly or daily, once each week for a period of four successive weeks, a notice under the hand of the clerk, setting forth that the delinquent tax roll of real property for the years in which taxes have been delinquent (specifying them) has been completed and is open for public inspection of such notice, the said roll will be presented to the District Court for the Territory of Alaska, Division Number One at Juneau, for judgment and order of sale. Said roll shall describe each tract on the roll on which the tax has not been paid, the amount of tax, penalty and interest due thereon, stated separately for each year, and the name of the person, partnership or corporation to whom assessed, if known, and if unknown it shall be so stated in said notice.

During the period of publication of such notice and up to the time of the order of sale, hereinabove provided, any person may appear and make payment on any piece, parcel or tract of real property set forth in said roll, together with the penalty and interest; and the clerk or other officer designated by the Board of Trustees shall make proper record of such payment on both the original and duplicate delinquent tax roll.

Section 18. On the day specified in said notice, or as soon thereafter as a hearing can be had before the court, the clerk, attorney, or other officer designated by the Board of Trustees, shall present the duplicate tax roll so completed as aforesaid, together with proof of publication of the notice provided in the preceding section, to the District Court aforesaid, for an order of sale of all real property therein listed, on which taxes have not been paid and are delinquent, and such proceedings shall be had in connection with the issuance of such order of sale as are provided by the laws of the Territory of Alaska; and all property upon which taxes shall not have been paid and upon which taxes, penalties and interest are due and payable and delinquent as hereinabove provided, shall be sold, as provided in Sections 1324 and 1325, Compiled Laws of Alaska, 1933, and all amendments thereto; and all proceedings shall be had with reference to notice of sale, the sale of property, the execution of certificates and deeds as are provided by the laws of the Territory of Alaska.

Section 19. No objection shall be entertained by the court to the amount of any tax levied pursuant to this ordinance and the laws of the Territory of Alaska, unless it appear at the time of the hearing before the court, as hereinbefore provided, that the owner of the property assessed and on which a reduction is sought, or someone on behalf of the owner shall have appeared and presented said objection in the manner prescribed by this ordinance before the board

of equalization for the year in which the assessment in question shall have been made.

Section 20. The term "real property" when used in this ordinance, shall include not only land itself, whether laid out in lots or otherwise, but also all buildings, structures, improvements, fixtures, of whatsoever kind thereon, and all possessory rights and privileges belonging or in anywise appertaining thereto, including possessory rights to tidelands; and the word "tract" shall include all lands, pieces or parcels of land, which may be separately assessed, together with the fixtures and improvements thereon; and the term "personal property" shall include all property defined as such by the laws of the Territory of Alaska.

Section 21. Wherever the word "person" occurs in this ordinance, it shall be deemed to include partnerships, firms and corporations, the singular shall include the plural, the masculine shall include the feminine and neuter.

Section 22. This ordinance shall be published by posting copies of the same in three public and conspicuous places in the City of Yakutat, for a period of thirty days, and it shall be in full force and effect from and after the date of its passage and approval.

Passed and approved by the Board of Trustees of the City of Yakutat, on this 3 day of July, 1948.

/s/ J. B. MALLOTT
Mayor.

Attest:

/s/ DAVID C. HENRY
Clerk.

EXHIBIT "B"

ORDINANCE No. 2

An Ordinance to provide for the assessment, levy and collection of taxes for the year 1948-9 by amending the dates thereof as set forth in Ordinance entitled "An ordinance to provide for the assessment, levy and collection of taxes; for the sale of property, both real and personal, and for the payment of taxes, penalties, interest and costs," passed and approved July (3), 1948.

City of Yakutat Does Ordain as Follows:

Section 1. That the ordinance passed and approved July (3), 1948, and entitled "An Ordinance to provide for the assessment, levy and collection of taxes; for the sale of property, both real and personal, and for the payment of taxes, penalties, interest and costs," be and it is hereby amended as follows:

In Section 2 of said ordinance, the election date of the assessor shall be on the first Saturday of July, 1948; the assessor shall mail blank assessment forms on or before July 25, 1948; the list of property shall be as of August 1, 1948 at 12 o'clock noon, in place of June 1; and such list of property shall be returned to the assessor on or before August 10, 1948.

In Section 3 of said ordinance, the listing and assessment of all property by the assessor shall be between July 7, 1948 and September 12, 1948, of property of the value and of the ownership as of August 1, 1948.

In Section 4 of said ordinance, the assessor must complete his work and assessment list on or before September 12, 1948.

In Section 6 of said ordinance, the meeting of the Board of Equalization shall commence on the last Monday of September, 1948.

In Section 12 of said ordinance, taxes shall become delinquent on November 15, 1948, at the hour of 6 o'clock p.m.; if taxes are paid in full on or before September 15, 1948, at 6 o'clock p.m., the 2% discount shall be allowed.

In Section 13 of said ordinance, the Clerk shall make personal and/or written demand for payment of taxes between November 15, 1948, and November 30, 1948.

Section 2. The mill rate of taxation provided to be set in said ordinance shall be applied by the Clerk in the collection of taxes to the extent of 87½% thereof.

Section 3. This ordinance shall be published by posting copies of the same in three public and conspicuous places in the City of Yakutat, for a period of 30 days, and it shall be in full force and effect from and after the date of its passage and approval to May 1, 1949.

Passed and approved by the Board of Trustees of the City of Yakutat, this 3rd day of July, 1948.

J. B. MALLOTT,
President of the Board of Trustees
and ex-officio Mayor.

Attest:

DAVID C. HENRY,
Clerk

EXHIBIT "C"

ORDINANCE No. 8

An Ordinance to Amend Ordinances Nos. 1 and 2 Relating to the Assessment and Collection of Taxes by Changing the Date of Delinquency of Taxes from September 15th to November 15th, 1948.

Be It Ordained, by the City of Yakutat, Alaska, that for the year 1948, Ordinances Nos. 1 and 2 be and hereby are amended so that payment of taxes shall become delinquent on November 15, 1948 in place of September 15, 1948.

Passed and approved by the Board of Trustees this 4th day of September, 1948.

/s/ JAY B. MALLOTT,
Mayor, City of Yakutat

Attest:
/s/ DAVID C. HENRY,
Clerk